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IN THE

Supreme Court of the United States

RICHARD E. GLOSSIP, ET AL.,

Petitioners,

v.

KEVIN J. GROSS, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF FORMER STATE ATTORNEYS GENERAL AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. Oklahoma's Selection of Midazolam Followed a Flawed Process with Disastrous Consequences. 5

A. Oklahoma's Rushed Decision to Use Midazolam 5

B. The Execution of Clayton Lockett Demonstrates that Midazolam Does Not Reliably Induce Unconsciousness 11

C. Following the Lockett Execution, Oklahoma Revises its Execution Protocol in Scientifically Invalid Ways. 14

II. Oklahoma's Flawed Process for Selecting Midazolam Did Not Comport with the State's Responsibility to Execute Lawful Punishments. 18

A. Oklahoma's Hasty, Unscientific Process for Selecting Midazolam Violated Its Solemn Duty to Carry Out Lawful Punishments. 20

B. Amici's Concerns Are Not Assuaged By Florida's Use of Midazolam Or An Alleged Lack of Alternative Drugs. 23

CONCLUSION 25

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INTEREST OF *AMICI CURIAE*[1]

Amici are former State Attorneys General who were responsible for ensuring the execution of criminal laws and punishments, including, in some States, the death penalty. *Amici* consist of a bipartisan group ranging across the political spectrum. *Amici* include both proponents and opponents of capital punishment, but all *amici* agree that if States carry out executions, they have a solemn duty to ensure that those executions are conducted in a humane manner. *Amici* therefore have a strong interest in ensuring that States engage in a proper process in selecting a constitutional method of execution. When the method is lethal injection, as it has been in this country for over 40 years, *amici's* interest includes ensuring that drugs chosen for the States' respective lethal injection protocols are scientifically capable of causing a humane death, free from intolerable risks of severe pain and suffering.

The individual *amici* are:

- William Broaddus, who served as Attorney General of Virginia from 1985 to 1986.

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[1] Pursuant to Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part, and no person other than *amici* and their counsel made any monetary contribution intended to fund the preparation or submission of this brief. Both parties have filed blanket letters of consent to the filing of *amicus* briefs with the Clerk's office.

- Robert Del Tufo, who served as Attorney General of New Jersey from 1990 to 1993.
- Mark Earley, who served as Attorney General of Virginia from 1998 to 2001.
- Tyrone Fahner, who served as Attorney General of Illinois from 1980 to 1983.
- Scott Harshbarger, who served as Attorney General of Massachusetts from 1991 to 1999.
- Robert Henry, who served as Attorney General of Oklahoma from 1987 to 1991. He also served as a Judge for the United States Court of Appeals for the Tenth Circuit from 1994 to 2010 and served as Chief Judge from 2008 to 2010.
- Peg Lautenschlager, who served as Attorney General of Wisconsin from 2003 to 2007.
- Vice President Walter Mondale, who served as Attorney General of Minnesota from 1960 to 1964. He subsequently served as a United States Senator from Minnesota from 1964 to 1976 and then as Vice President of the United States from 1971 to 1981.
- Jim Petro, who served as Attorney General of Ohio from 2003 to 2007. He also served as a Member of the Ohio House of Representatives from 1981 to 1984, and again from 1987 to 1990.
- Deborah Poritz, who served as Attorney General of New Jersey from 1994 to 1996.

She subsequently served as Chief Justice of the New Jersey Supreme Court from 1996 to 2006.

- Ernie Preate, who served as Attorney General of Pennsylvania from 1989 to 1995.
- Mark Shurtleff, who served as Attorney General of Utah from 2001 to 2013.
- John Van de Kamp, who served as Attorney General of California from 1983 to 1991.

SUMMARY OF ARGUMENT

As former State Attorneys General, *amici* have significant experience enforcing criminal laws and ensuring that the people's chosen punishments are carried out in a lawful manner. *Amici* consider the selection and implementation of the means of executing prisoners condemned to death to be the most solemn responsibility of state law enforcement officials. This responsibility demands serious contemplation, consideration of scientific, medical, and technical evidence, and collaboration with experts.

Oklahoma failed to meet those standards here. With execution dates set for two condemned prisoners on the same date, Oklahoma lawyers were under temporal and political pressure to go forward with the executions. When their source of pentobarbital fell through, they quickly selected midazolam to serve as the crucial first drug in a three-drug protocol, even though it is not medically equivalent to the drugs typically used for that purpose. The lawyers who made this decision did not consult scientific, medical, or

correctional experts; instead, they relied on their own internet research and conversations with officials in other States, most of whom lacked any experience with midazolam. And even after the use of midazolam contributed to what is widely considered the botched execution of Clayton Lockett, Oklahoma officials *still* failed to eliminate that drug from their protocol.

The process by which Oklahoma officials decided to use midazolam, and their subsequent entrenchment regarding that decision, stand in marked contrast to the experience of other States. Recognizing midazolam's inefficacy, at least one State has abandoned the drug altogether, another has abandoned a proposed two-drug protocol that featured midazolam, and a third has put a hold on all executions. And contrary to Oklahoma's assertion that in light of other drug shortages, it *must* use midazolam to carry out its executions, several States have conducted lawful executions without midazolam during the pendency of this very case. Even if that were not so, Oklahoma cannot justify its hurried process and resulting use of midazolam on the basis of urgency: Oklahoma's interest in enforcing punishments is not jeopardized by a short delay in carrying out the punishment and such urgency does not trump constitutional requirements.

Oklahoma's flawed process for adopting midazolam, and its refusal to meaningfully reconsider that decision, provide a case study in how state officials should *not* approach the most solemn duty of selecting the means of execution. For this reason, as well as those provided by petitioners, *amici* respectfully submit that the decision below should be reversed.

ARGUMENT

I. Oklahoma's Selection of Midazolam Followed a Flawed Process with Disastrous Consequences.

A. Oklahoma's Rushed Decision to Use Midazolam.

Like many States, Oklahoma uses a three-drug protocol to carry out executions by lethal injection. As this Court explained in *Baze v. Rees*, 553 U.S. 35, 44 (2008), the first drug in a three-drug protocol is crucial: it induces a deep, comalike unconsciousness, thus "ensur[ing] that the prisoner does not experience any pain associated with the paralysis and cardiac arrest caused by the second and third drugs," respectively. Without a proper dose of an effective first drug, "there is a substantial, constitutionally unacceptable risk" that the prisoner will suffer severe pain and suffering from the administration of the other two drugs, which generally produce paralysis and stop the prisoner's heart, respectively. *Id.* at 53. The respondents here conceded this extreme suffering would occur if the second and third drugs were administered to an aware individual. Amended Complaint ¶¶ 98-99, ECF No. 75, Answer to Amended Complaint ¶ 50, ECF No. 96.

For many years, Oklahoma's three-drug protocol began with a dose of sodium thiopental, the same drug used by Kentucky in *Baze*, to render the prisoner unconscious. J.A.114. As *Baze* explained, sodium thiopental "induces a deep, comalike unconsciousness when given in the amounts used for lethal injection"; that unconsciousness protects prisoners from an unconstitutional risk of pain and suffering from the

administration of the second and third drugs. 553 U.S. at 44. In 2010, Oklahoma became unable to obtain sodium thiopental for use in its executions. Instead, Oklahoma used pentobarbital, a barbiturate similar to sodium thiopental. J.A.115; *see* J.A.153; *Pavatt v. Jones*, 627 F.3d 1336, 1337 (10th Cir. 2010).

In March 2014, Oklahoma officials were preparing for the executions of Clayton Lockett and Charles Warner, which were scheduled for March 20 and March 27, respectively. Supp. Vol. III[2] at 1, 3. On Monday, March 17, the Assistant Attorney General defending the State in the death penalty appeals of Lockett and Warner, advised the Oklahoma Court of Criminal Appeals (OCCA) that the commitment the State had from a pharmacy supplying its drugs "fell through." Supp. Vol. III at 13. According to the Assistant Attorney General, pentobarbital was in "short supply." (*Id.*) As a result, the Assistant Attorney General informed the OCCA that the Oklahoma Department of Corrections (ODOC) might "revise its execution protocol to incorporate drugs that are currently available, and obtainable, by ODOC on the open market." Supp. Vol. III at 14.

The following day, the OCCA rescheduled the Lockett and Warner executions for late April 2014. Supp. Vol. III at 37. Both executions were ultimately scheduled on April 29, 2014 on order of Oklahoma's Governor. Exec. Order No. 2014-08, Governor of

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[2] "Supp. Vol. __" refers to the supplemental record on appeal filed in the 10th Circuit proceeding.

Oklahoma (Apr. 22, 2014) *available at* https://www.sos.ok.gov/documents/executive/939.pdf.

Oklahoma officials did not take this additional time to engage in a meaningful analysis of the merits and risks associated with potential substitutes for pentobarbital. Instead, *just four days after* informing the OCCA of the drug shortage, Oklahoma State Penitentiary Warden Anita Trammell, a respondent here, signed a new execution protocol effective March 21, 2014. That protocol, for the first time, included midazolam as an alternative substitute for sodium thiopental or pentobarbital in the three-drug execution protocol.[3]

As petitioners have explained (Pet'rs' Br. at 11-17), midazolam has little in common with sodium thiopental and pentobarbital. Midazolam is not a barbiturate; instead, it belongs to a class of drugs called benzodiazepines, and it is meant primarily to reduce anxiety and to produce mild sedation. J.A.203; J.A.263. Midazolam has no analgesic, or pain-relieving, qualities, and it is not approved by the FDA for use as a sole anesthesic. J.A.204-05, 223; J.A.260-61; J.A.340-41; Brief of Appellant at 8, *Warner v. Gross*, 776 F.3d 721 (10th Cir. 2015) (No. 14-6244) ["Appellant Br."] (citing Tr. 12/19/2014 at 661:8-9). In the district court, multiple experts testified that while midazolam is generally used to reduce anxiety *before* surgery, it does not work to

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[3] The drug protocol was altered again in April 2014 to increase the dose of midazolam. The higher, 100 milligram dose was used in the Lockett execution, discussed *infra*.

produce and reliably maintain general anesthesia and so should not be used as the sole agent to render a patient unconscious during painful surgical procedures. Pet'rs' Br. at 12-16.

Two of midazolam's properties are particularly relevant to Oklahoma's decision to adopt the drug. *First*, unlike barbiturates such as sodium thiopental and pentobarbital, midazolam has a "ceiling effect": after a certain dosage, the administration of additional midazolam does not produce an additional effect. J.A.206; Pet'rs' Br. at 16 n.17 (citing Tr. 343, 664). Thus, as multiple experts testified, no amount of midazolam will induce a coma or electrical brain silence. J.A.207-09; *see also* J.A.263-64. Midazolam's ceiling effect, coupled with its lack of analgesic effect, means that midazolam cannot reliably produce and maintain the level of unconsciousness necessary for induction of painful stimuli. Pet'rs' Br. at 16-17 (citing Tr. 145).

Second, midazolam carries a risk of a "paradoxical" effect. Instead of causing the sedation for which it is intended, midazolam may cause a person to experience "agitation, combativeness, and anxiety." J.A.210; *see also* J.A.263-64; Appellant Br. at 15 (citing Tr. 12/19/2014 at 669:3-5). This reaction is more likely in individuals who (like petitioners and many death row inmates) exhibit "behaviors such as aggression, impulsivity, substance abuse, and [those] suffering from other psychiatric disorders or psychological disturbances." Pet'rs' Br. at 14 n.15 (citing Tr. 116). A paradoxical reaction may occur in between 1-10% of individuals administered the drug. J.A.210; Appellant Br. at 15 (citing Tr. 12/18/2014 at 348:17-25).

Despite the scientific consensus concerning midazolam's unsuitability, Oklahoma officials decided to substitute it as the crucial first drug in the three-drug protocol. This was not the result of lengthy deliberation and study by medical or correctional professionals. To the contrary, over the course of a few days in March 2014, a group of government lawyers from the ODOC and Attorney General's Office made the decision while under significant time and political pressure. *See* J.A.147. For example, the General Counsel of the ODOC at the time testified that "there were calls from the Governor's office . . . we would get word from the Attorney General's Office that we better hurry up and do something." J.A.148.

The lawyers ran the process *even though* Oklahoma's execution protocol gave Warden Trammell "sole discretion as to which lethal agent will be used for the scheduled execution." Supp. Vol. I at 44 § IX.C.7; Pet'rs' Br. at 9. In fact, Trammell "wasn't really brought into" the decision whether to adopt midazolam. Appellant Br. at 23 (quoting Supp. Vol. II at 214:1). She did not "draft the new protocol," and she conceded that she knew nothing about midazolam and did no independent research. J.A.152-53.

Nor did the lawyers themselves engage in serious research regarding midazolam or consult scientists or medical experts. For example, the former ODOC General Counsel testified that "they" decided on midazolam because "we knew midazolam had the same properties as pentobarbital as far as sedation goes." J.A.145. He testified that he received this information – which is incorrect, *see supra* – from the Attorney

General's office, his own internet research, and correctional personnel in other states. In particular, he testified that he "looked on-line . . . . Went past the key Wiki leaks, Wiki leaks or whatever it is, and I did find out that when administered, Midazolam would . . . render a person unconscious." Appellant Br. at 24 (citing Supp. Vol. II at 211:19-22). The General Counsel further testified that he was unaware of criticism of the information provided on such websites. J.A.147. In addition, he testified that he did not uncover any information about the risks of a paradoxical reaction or the ceiling effect. J.A.149.

The ODOC General Counsel also stated that Oklahoma officials spoke with officials from Illinois, Arizona, and Texas "one day," though none of those consultations (or any others) occurred in person. Appellant Br. at 25 (citing Supp. Vol. II at 187:20-21, 192:19). And in fact, *none* of those States were using midazolam to carry out executions at this time: Illinois abolished the death penalty in 2011,[4] Arizona first used midazolam to carry out a death sentence in July 2014,[5]

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[4] *See* Christopher Wills, *Illinois Gov. Pat Quinn Abolishes Death Penalty, Clears Death Row*, Wash. Post, Mar. 9, 2011, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2011/03/09/AR2011030900319.html.

[5] *See* Ben Brumfield, *Arizona Execution Raises Questions Over Novel Lethal Injections*, CNN, July 25, 2014, http://www.cnn.com/2014/07/24/justice/lethal-injection-controversy/; As discussed, *supra*, Arizona has stayed execution pending the investigation into the Wood execution.

and Texas does not use midazolam in its protocol.[6] Finally, the ODOC General Counsel consulted with the General Counsel in Ohio, who told him that the Ohio execution of Dennis McGuire, which involved a combination of midazolam and hydromorphone, "really didn't take that long" and "didn't take as long as what the new[s] stories were." Appellant Br. at 25 (quoting Supp. Vol. II at 212:6-8). The "news stories" to which the Ohio official referred recounted that McGuire gasped for breath, choked, and struggled against his restraints for 26 minutes before dying.[7] Yet, Oklahoma officials did not delay, adopting the midazolom protocol on March 21, 2014.

B. The Execution of Clayton Lockett Demonstrates that Midazolam Does Not Reliably Induce Unconsciousness.

Armed with its newly developed protocol, Oklahoma carried out the execution of Clayton Lockett on April 29, 2014. The execution began with 100 milligrams of midazolam, followed by 50 milligrams of vecuronium bromide, a paralytic, and 200 milliequivalents of potassium chloride, which "interferes with the

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[6] *See* Texas Department of Criminal Justice—Execution Procedures, http://www.fdp.dk/uk/tdcj/exe-proc.htm (last visited Mar. 12, 2015).

[7] *See* Alan Johnson, *Dennis McGuire's Execution was Not 'Humane,' Doctor Days*, Columbus Dispatch, Aug. 13, 2014, *available at* http://tinyurl.com/mmadmwh. As discussed *supra*, following the McGuire execution, Ohio abandoned its use of midazolam.

electrical signals that stimulate the contractions of the heart, inducing cardiac arrest." *Baze*, 553 U.S. at 44.

The Lockett execution did not go smoothly. Warden Trammel described it as a "bloody mess," Appellant Br. at 4 n.4 (citing Supp. Vol. II at 88), while a paramedic referred to the entire process as "such a cluster," Appellant Br. at 16 & n.10 (quoting Supp. Vol. VI at 400:15-16).[8] Following the execution, Governor Fallin appointed the Secretary of Safety and Security and Department of Public Safety ("DPS") Commissioner to conduct an independent review of the execution.[9] Although the DPS review did not determine the appropriateness of any of the drugs or dosages in Oklahoma's three-drug protocol, *see* J.A.411-12, its findings regarding the Lockett execution speak volumes about the inefficacy of midazolam.[10]

As the DPS review explains, the execution began with administration of the full dose of midazolam. Seven minutes later, the physician determined that

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[8] *See generally* Cary Aspinwall & Ziva Branstetter, *Records Reveal Lack of Protocol in Clayton Lockett's Oklahoma Execution*, Tulsa World, Mar. 16, 2015, *available at* http://www.tulsaworld.com/homepage1/records-reveal-lack-of-protocol-in-clayton-lockett-s-oklahoma/article_e4f17853-160c-530a-9f36-928a0fd9f605.html.

[9] *See* Oklahoma Dep't of Pub. Safety, *The Execution of Clayton D. Lockett, Case Number 14-0189SI: Executive Summary*, *available at* http://tinyurl.com/k5nlmp6 (last visited Mar. 12, 2015).

[10] Indeed, the agent in charge of the investigation, Captain Jason Holt, did not see investigation into midazolam as the mission of the governor's executive order. J.A.424-25.

Lockett was unconscious. J.A.392-93. The full dose of vecuronium bromide and the "majority" of the potassium chloride were then administered. J.A.393 However, at that time, Lockett "began to move and make sounds on the execution table." *Id.* While witnesses' accounts differed somewhat, witnesses reported that Lockett writhed and strained against his restraints, mumbled, spoke, repeatedly tried to raise his head and shoulders from the gurney, and was "kicking" and "bucking . . like he wanted to get off . the gurney." J.A.214; Appellant Br. at 19 (quoting Tr. 12/17/2014 206:7-8).

Around this time, the physician inspected the IV insertion site and determined "there was an issue." J.A.393. The physician and paramedic attempted additional IV access, the member of the execution team charged with administering the drugs stopped administering the potassium chloride, and officials discussed how to proceed. J.A.393-95. The execution was then stopped. J.A.395. Ten minutes later – approximately 43 minutes after the execution had begun – Lockett was pronounced dead. *Id.*

The DPS investigation concluded that "the viability of the IV access point was the single greatest factor that contributed to the difficulty in administering the execution drugs." J.A.398. In particular, the failure of IV access meant that the drugs infiltrated into Lockett's tissue. Although midazolam has a relatively rapid rate of absorption even when injected intramuscularly, Appellant Br. at 18 (citing Tr. 12/17/2014 at 116), the paralyzing agent, vecuronium bromide, is much less effective when delivered through

tissue, Appellant Br. at 18 (citing Tr. 12/17/2014 at 120). Because at least some of the vecuronium bromide was delivered through tissue, Lockett was not fully paralyzed, allowing him to speak and move.

The failure of the paralytic agent reveals that the first drug, midazolam, did not keep Lockett in a deep, coma-like state of unconsciousness. As medical experts explained in the district court, an unconscious person does not "make efforts to speak to you," "rise up off the gurney," or gesticulate "with their torso." J.A.216; *see* J.A.338-40, 345. And because Lockett regained consciousness, administration of the second drug, vecuronium bromide, likely caused him to experience a feeling of "gradual suffocation, the inability to draw one's breath, air hunger, and a progressive suffocation." J.A.214-15. Similarly, administration of the third drug, potassium chloride, which has been described as "liquid fire," likely caused Lockett severe pain. J.A.215; *see also* Appellant Br. at 19 (quoting Tr. 12/22/2014 at 15:1-3 (district court stated that "Lockett was surely experiencing all of the mental pain that is inevitable in the execution process as well as serious physical discomfort if not serious physical pain")).

C. Following the Lockett Execution, Oklahoma Revises its Execution Protocol in Scientifically Invalid Ways.

Oklahoma responded to the Lockett execution and the DPS report by issuing a revised execution protocol in September 2014. For example, Oklahoma now requires a backup set of lethal drugs, in the event there is a problem with the administration of the first set of drugs. Oklahoma also changed the required training

for some personnel and now requires documentation of that training. In addition, Oklahoma altered the procedures for monitoring consciousness during an execution. Supp. Vol. X at 335-39 (Plaintiff's Exh. 68 (Sept. 30, 2014 protocol)). Oklahoma also renovated the three rooms associated with executions: the execution chamber, the chemical room, and the witness viewing area. It enlarged the chemical room and installed a camera system and an updated communication system. In enlarging the chemical room, the chamber was reduced in size, and the number of media witnesses who may view executions was limited to five.[11] Oklahoma also set out procedures and purchased new equipment designed to improve IV access and IV observations.

Oklahoma did not, however, revisit the use of midazolam, other than to increase the suggested dosage from 100 milligrams to 500 milligrams. *Compare* Supp. Vol. I at 58-77 (Plaintiff's Exh. 4 (Apr. 14, 2014 protocol)), *with* Supp. Vol. X at 297-341 (Plaintiff's Exh. 68 (Sept. 30, 2014 protocol)). As explained *supra*, because of midazolam's ceiling effect, increasing the dosage will *not* increase the likelihood that midazolam will produce unconsciousness. In fact, when Arizona executed Joseph Wood in July 2014, it administered 750 milligrams of midazolam, 50% more than Oklahoma's

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[11] Supp. Vol. X at 125-26 (Crow Dep. Nov. 26, 2014, 120:17-121:21); *Oklahoma Unveils New Execution Protocols to Replace Those that Led to Inmates 43-Minute Death*, Associated Press, Sept. 30, 2014, *available at* http://tinyurl.com/mtrzysp.

revised protocol requires.[12] Wood nonetheless gasped and struggled to breathe during the execution, which took almost two hours to complete.[13]

Oklahoma's refusal to reconsider its use of midazolam is consistent with its process for adopting the drug in the first place. Oklahoma officials once again failed to consult objective scientific and medical experts, and they failed to take account of midazolam's known ceiling effect, as demonstrated by the Wood execution.[14] *See* J.A.158-60.

Oklahoma's response to the Lockett execution stands in marked contrast to the experience of other States. For example, as previously noted, Ohio used a combination of midazolam and hydromorphone to execute Dennis McGuire in January 2014. McGuire chocked and gasped before he died in an execution that lasted over 25 minutes. *See supra* at 10. Following an investigation, Ohio abandoned its use of midazolam, issuing a new

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[12] Press Release, Arizona Dep't of Corrections, Independent Review Process for Wood Execution Underway, Aug. 1, 2014, *available at* http://tinyurl.com/mhk4hx6.

[13] Michael Kiefer, *Reporter Describes Arizona Execution: 2 Hours, 640 Gasps*, The Republic, Nov. 6, 2014, *available at* http://tinyurl.com/lnaz6k8.

[14] One witness testified that Oklahoma officials consulted Dr. R. Lee Evans, who became the State's testifying expert in this case. Supp. Vol. X at 38-39 (Crow Dep. Nov. 26, 2014, 33:16-34:6). However, it appears that Dr. Evans was selected because he had testified in support of Florida's use of midazolam. To *amicis'* knowledge, Oklahoma officials did not seek out any objective medical or scientific experts.

execution protocol using thiopental sodium and pentobarbital for its executions.[15] Arizona, moreover, has put all executions on hold after its flawed execution of Joseph Wood, who gasped and snored for nearly two hours before ultimately dying.[16] Lastly, in light of the botched executions in Ohio and Arizona, the Kentucky Attorney General announced that Kentucky was abandoning its proposed two-drug execution method, which would have used midazolam.[17]

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[15] Mark Berman, *Ohio Drops Controversial Lethal Injection Drugs, Postpones Upcoming Execution*, Wash. Post, Jan. 9, 2015, *available at* http://www.washingtonpost.com/news/post-nation/wp/2015/01/09/ohio-drops-controversial-lethal-injection-drug-postpones-upcoming-execution/. Ohio has recognized that the need to find these drugs may take some time, and it has therefore postponed executions scheduled for this calendar year. Mark Berman, *Ohio Delays all Executions Scheduled for 2015*, Wash. Post, Jan. 31, 2015, *available at* http://tinyurl.com/kkhagob. However, as discussed *infra*, other States have continued to carry out lawful executions with drugs other than midazolam, demonstrating that state officials need not choose between their responsibility to carry out executions and their duty to ensure that those executions proceed in a humane and constitutional manner.

[16] Michael Kiefer, *Arizona to Change Drugs Used for Executions*, USA Today, Dec. 23, 2014, *available at* http://www.usatoday.com/story/news/nation/2014/12/23/report-arizona-execution-change-drugs/20796903/.

[17] Brett Barrouquere, *Kentucky Drops 2-Drug Executions, Reworking Method*, Daily Mail, Nov. 14, 2014, *available at* http://www.dailymail.co.uk/wires/ap/article-2834665/Kentucky-drops-2-drug-executions-reworking-method.html.

II. Oklahoma's Flawed Process for Selecting Midazolam Did Not Comport with the State's Responsibility to Execute Lawful Punishments.

As former State Attorneys General, *amici* have served as chief law enforcement officers of their respective States, charged with carrying out punishments imposed by the judiciary. *See, e.g.*, Nat'l Ass'n of Attorneys General, *2014 Strategic Plan: Setting the Course* at 4 (2014), *available at* http://www.naag.org/assets/files/pdf/policy/2014%20NAAG%20Strategic%20Plan.pdf; Cal. Const. art V, § 13 (State Attorney General has duty to "see that the laws of the State are uniformly and adequately enforced."). With that enforcement responsibility comes the corollary obligation to ensure that punishments are lawful. Indeed, attorneys general have long recognized their obligation to interpret and execute the law in a lawful and constitutional manner.[18] And *amici*, too, considered it their solemn duty to ensure that such

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[18] *See, e.g.*, Walter Dellinger & H. Jefferson Powell, *The Constitutionality of the Bank Bill: The Attorney General's First Constitutional Law Opinions*, 44 Duke L.J. 110, 112-13 (1994) ("Randolph, far more than either Hamilton or Jefferson, made a conscious attempt to distinguish his professional judgment about the legal question of constitutionality from his political judgment about the desirability of a national bank."); Attorney General Caleb Cushing, Office and Duties of Attorney General, 6 Op. Att'y Gen. 326, 334 (1854) (referring to the attorney general's "solemn responsibilities of conscience and of legal obligation"); Letter from Attorney General William Wirt to Secretary of War, John. C. Calhoun (Feb. 3, 1820) (noting his obligation as attorney general to "decide a question of law with the impartiality and integrity which characterizes the judician").

punishments complied with both the United States Constitution and their respective state constitutions.[19]

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[19] *See, e.g.*, Georgia Attorney General Mission Statement, *available at* http://law.ga.gov/mission-statement (last visited Mar. 12, 2015) ("The mission of the Department of Law is to serve the citizens of the State of Georgia by . . . honorably and vigorously carrying out the constitutional and statutory responsibilities of the Attorney General."); About the Office, Virginia Attorney General, *available at* tinyurl.com/kfvewcq (last visited Mar. 13, 2015) ("The Attorney General has the duty and power to . . . Support the Constitution of the United States and the Constitutional of Virginia."); Ohio Const. art. III, § 6 (Governor "shall see that the laws are faithfully executed"); Mass. Const. part 2, ch. VI, art. VI ("All the laws which have heretofore been adopted, used, and approved . . . shall still remain and be in full force . . . such parts only excepted as are repugnant to the rights of liberties contained in this constitution); N.J. Const. art. VII, § I, ¶ 1 ("Every State officer . . . shall take and subscribe an oath or affirmation to support the Constitution of this State and of the United States and to perform the duties of his office faithfully, impartially and justly to the best of his ability."); Minn. Const. art. V, § 6 ("Each [executive] officer . . . shall take an oath or affirmation to support the constitution of the United States and of this state and to discharge faithfully the duties of his office to the best of his judgment and ability."); Okla. Const. art. 15, § 1 ("All public officers ... shall take and subscribe to" an "oath or affirmation" affirming that they will "support, obey, and defend the Constitution of the United States, and the Constitution of the State of Oklahoma"); Ill. Const. art. XIII, § 3 ("Each prospective holder of a State office" shall affirm that they "solemnly swear (affirm) that [they] will support the Constitution of the United States and the Constitution of the State of Illinois, and that [they] will faithfully discharge the duties of the office of .... to the best of [their] ability."); Wis. Const. art. IV § 28 (Executive officers "shall . take and subscribe an oath or affirmation to support the constitution of the United States and the constitution of the state

Amici have paid particular care to the death penalty, and strongly believe that States should not move forward with executions in the absence of drugs that can assure the Court and the citizens of their States that the executions will not cause needless pain in violation of the United States Constitution.

A. Oklahoma's Hasty, Unscientific Process for Selecting Midazolam Violated Its Solemn Duty to Carry Out Lawful Punishments.

Oklahoma's hasty, non-science-driven process for selecting midazolam as the first drug in its three-drug protocol did not cohere with its solemn duty to ensure its punishments are lawful.

Amici recognize that when States carry out executions using a three-drug lethal injection protocol – as Oklahoma plans to do here – the first drug should induce a "deep, comalike unconsciousness" in order to render the prisoner insensate to the known and severe pain and suffering caused by the second and third drugs. *Baze*, 553 U.S. at 44; *supra* at 4. The Supreme Court in *Baze*, for example, found that sodium thiopental – the first drug in the three-drug protocol at issue in that case – induced such a state of unconsciousness. 553 U.S. at 44. The first drug's importance is highlighted by the fact that it would be constitutionally impermissible to administer the second and third drugs to a conscious prisoner because to do so would expose the prisoner to an "objectively intolerable

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of Wisconsin, and faithfully to discharge the duties of their respective offices to the best of their ability").

risk of harm" and would surely cause "needless suffering." *Baze*, 553 U.S. at 50 (*quoting Farmer v. Brennan*, 511 U.S. 825, 842 (1994) and *Helling v. McKinney*, 509 U.S. 25, 33, 34-35 (1993)). To avoid running afoul of the Eighth Amendment, then, it is crucial that the first drug reliably produce a deep, coma-like unconsciousness that is maintained throughout the execution. This makes the State's selection of the first drug – the anesthetic – an exceedingly important task, one which should involve careful research and thoughtful deliberation, including consultation with experts in the relevant medical and scientific fields.

Amici believe this case presents the Court with strong evidence that Oklahoma failed to conduct careful research and engage in the appropriate process when it selected midazolam as the first drug in its protocol. Oklahoma did not consult *any* scientists or experts when choosing midazolam. *See supra* at 10-11. Far from careful expert consultation, Oklahoma's selection of midazolam was a product of a rushed, non-science-driven process. *See supra* at 9-12. Indeed, the primary personnel involved in choosing midazolam were the former General Counsel for Oklahoma Department of Corrections, and members of the Oklahoma Attorney General's office, all lawyers. *See supra* at 9-10. And political and time pressure rushed the drug selection, forcing the resort to "Wiki leaks or whatever it is" as a main basis for the State's selection of midazolam. *See supra* at 9.

Amici believe that such a hurried, unscientific process does not suffice. Rather, the state agencies

statutorily charged with carrying out executions – *not* the attorneys representing those agencies – bear responsibility for conducting the necessary medical and scientific research to determine which drugs are appropriate and available for use in executions. Such research may involve meeting with experts, reviewing relevant studies with those experts, or even working with laboratory scientists.[20] *Amici* believe that based on such research, the relevant agencies should engage in reasoned deliberation to select the appropriate drugs for lethal injection. *Cf. Kentucky Holding Public Hearing on Execution Method*, Associated Press, Sept. 25, 2012, *available at* http://www.wkyt.com/home/headlines/Ky-holding-public-hearing-on-execution-method-171112591.html (Kentucky officials hold public hearing on new proposed execution method).

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[20] *See, e.g.*, Mark Berman, *Georgia Postpones First Execution of a Woman Since WWII Due to Issues With Legal Injection Drugs*, Wash. Post, Mar. 2, 2015, *available at* http://tinyurl.com/l3k5bl5 (execution postponed after drugs sent to independent lab for potency testing before execution); *Indiana Use of New Execution Drug Draws Opposition*, Associated Press, May 31, 2014, *available at* http://www.cbsnews.com/news/indiana-use-of-new-execution-drug-draws-opposition/ (Indiana consulted with pharmacists and experts before choosing its death penalty anesthetic); *Baze*, 553 U.S. at 42 ("In 1977, legislators in Oklahoma, after consulting with the head of the anesthesiology department at the University of Oklahoma College of Medicine, introduced the first bill proposing lethal injection as the State's method of execution.").

B. Amici's Concerns Are Not Assuaged By Florida's Use of Midazolam Or An Alleged Lack of Alternative Drugs.

Amici's concerns are not assuaged by the fact that Florida uses midazolam as the first drug in its three-drug execution protocol. Like Oklahoma, Florida, for its second drug, administers a paralytic that would render a prisoner unable to move even if he were awake and conscious. This makes it impossible for observers to detect any pain and suffering the prisoner may be undergoing. *See Warner v. Gross*, 135 S. Ct. 824, 827 (2015) (Sotomayor, J., dissenting from denial of stay) ("[Florida's] apparent success with that method is subject to question because the injection of the paralytic . . . may mask the ineffectiveness of midazolam as an anesthetic: The inmate may be fully conscious but unable to move."); *Baze*, 553 U.S. at 71 (Stevens, J., concurring in judgment) (paralytic "masks any outward sign of distress").

Nor are *amici*'s concerns assuaged by an assertion that Oklahoma has no choice but to use midazolam because of the lack of alternatives. States carry out lawful executions by lethal injection on a regular basis without using midazolam. Indeed, since Clayton Lockett's execution on April 29, 2014, three different States have executed 18 prisoners without midazolam.[21]

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[21] *See* Execution List 2015, *Death Penalty Information Center*, tinyurl.com/mv6je7j (last visited Mar. 13, 2015); Execution List 2014, *Death Penalty Information Center*, *available at* http://tinyurl.com/o58d87p (last visited Mar. 13, 2015). Four of those executions occurred after this Court granted certiorari in

Thus, Oklahoma and its *amici* cannot plausibly contend that a three-drug protocol beginning with midazolam is the "best available mechanism" to carry out lethal injection, Brief in Opposition at 5, or that a ruling in petitioners' favor will render the State unable to carry out lawful executions.

Even if alternatives to midazolam were not immediately available, urgency cannot justify Oklahoma's rushed and haphazard decisionmaking process. While *amici* appreciate and endorse the State's interest in enforcing its criminal laws and carrying out punishments pursuant to those laws, *amici* do not believe that interest is jeopardized by delaying executions for a short period of time to ensure they are carried out in a humane and lawful manner. *Amici*, furthermore, do not believe such urgency could justify imposing a punishment that does not cohere with the Constitution, even assuming the State's interest in carrying out punishments were jeopardized.

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this case. *See* Execution List 2015, *Death Penalty Information Center*, *available at* tinyurl.com/mv6je7j.

CONCLUSION

For the foregoing reasons, the judgment of the Tenth Circuit should be reversed.

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